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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1020

SOCIALIST WORKERS PARTY, *et al.*

Appellants,

v.

MARCH FONG EU, Secretary of State of the State of California,

Appellee.

JURISDICTIONAL STATEMENT ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Appellants SOCIALIST WORKERS PARTY et al. respectfully pray for either summary reversal of the decisions below or for plenary consideration of the questions presented, with briefs on the merits and oral argument.

OPINION BELOW

There are two opinions by the District Court, neither of which has been reported. The first is dated June 7,

1976, and rejects appellants' attack on the constitutionality of California Elections Code §6430.[1] It is reprinted at pages 1a to 11a of the Appendix. The second opinion is dated Sept. 9, 1976, and partially rejects and partially accepts appellants contention, made in a First Amended Complaint, that §10210 is unconstitutional. It is reprinted at pages 16a to 27a of the Appendix.

JURISDICTION

In July 1973, appellants filed suit in the United States District Court for the Northern District of California alleging deprivation of their constitutional rights by the operation of provisions of the California Elections Code governing access to the ballot for new parties. Jurisdiction was alleged under the First and Fourteenth Amendments, and under 28 U.S.C. §§1331(a), 1343(4), 1357, 2201, 2202, 2281, and 2284, and 42 U.S.C. §§1981, 1985(3), and 1988. Because appellants sought an injunction against the operation of California law, application was made for the convening of a three-judge District Court under 28 U.S.C. §2281, and a three-judge court was duly convened. After both parties engaged in discovery through interrogatory and deposition, the cause was submitted on cross-motions for summary judgment. The court granted appellee's motion, and denied appellants' motion, on June 7, 1976. Judge Browning of the Court of Appeals for the Ninth Circuit concurred in the result arrivetl at by the Court, based on equitable considerations relating to relief, but he found the constitutionality of the statute "doubtful." Appendix, page 11a

[1] Unless otherwise specified, all section citations hereafter refer to the California Elections Code.

The Court granted appellants leave to amend their complaint to further brief issues raised by Elections Code sections making it impossible for nonqualified party candidates to run for district office as party candidates. The court filed its opinion dealing with the claims so raised on Sept. 9, 1976, and judgment in the entire cause was entered Sept. 30, 1976. Notice of appeal to this Court was filed Nov. 23, 1976 in the District Court, see Appendix, page 30a. Jurisdiction is conferred on this Court by 28 U.S.C. §1253.

STATUTES INVOLVED

Appellants challenge the constitutionality of two California Elections Code sections, §6430, which governs political party qualification for the ballot, and §10210, which governs the description of political affiliation printed adjacent to the candidate's name on the ballot. These statutes are reprinted at pp. 33a and 35a of the Appendix, respectively. Also relevant to consideration of §6430 is §6460, reprinted at p. 34a of the Appendix, which affects the deadline for obtaining registrations. Section 10210 is important in context with §§6800 et seq. which describe an "Independent nominations" method for placing candidates names on the ballot available to nonqualified party candidates as an alternative to the process described in §6430. These sections are reprinted at pages 36a to 41a of the Appendix.

QUESTIONS PRESENTED

(1) Whether California law governing qualification of political parties for ballot status is unconstitutional in

view of the fact that it requires aspiring parties to make an extraordinary showing of support of either approximately 636,400 petition signatures (based on the most recent voting figures) or 63,640 registered party voters, and in view of the fact that it requires that this support be shown approximately 300 days before the general election?

(2) Whether California law governing qualification of political parties for ballot status is unconstitutional considering that it permits an already qualified party to retain its qualified status on a far lesser showing of support than that required to attain qualified status originally?

(3) Whether California can constitutionally prohibit candiates nominated by petition under §§6800 et seq. from accurately designating their political affiliation to be printed on the statewide ballot, or whether California can instead insist that the word "Independent" appear next to the name of every such candidate.

STATEMENT OF THE CASE

Appellants are several political parties and various of their candidates for district, statewide, and national office in the 1974 and 1976 general elections. Although this suit was filed well before the 1974 general election, these proceedings were stayed pending this Court's consideration of *Storer v. Brown*, 415 U.S. 724 (1974) and *American Party of Texas v. White*, 415 U.S. 767 (1974).[2] Appellants wish to have their names printed

[2] The complaint herein was filed by previous counsel. Undersigned counsel assumed responsibility after the stay was dissolved.

on the California general election ballot, and seek declaratory and injunctive relief denied them by the District Court against the operation of §§6430(c) and (d) par. 1 and §10210 (the last sentence thereof).

For a political party in California to participate in a general election, it must first participate in a primary election. Thus the language of §6430, the only statute providing access to the ballot for political parties, is entirely in terms of qualifying for the primary election held in early June. Section 6430 provides two routes for nonqualified parties to obtain ballot status: first, under subsection (c), a party may qualify if voters equal to one percent of the entire vote of the State at the last preceeding gubernatorial election declare their intention to affiliate with the party. The declaration is the standard method is California of registering with a party and becoming entitled to vote in its primary election. Second, under subsection (d) par. 1, a party may qualify if voters equal in number to 10 percent of the entire vote of the State at the last preceeding gubernatorial election sign a petition declaring that they represent the party and desire that it participate in the next primary election. Based on the last preceeding gubernatorial election in California, a party needs 63,640 registrants, or 636,400 petition signatures, to qualify.

Although §6430(c) requires appellee Secretary of State to determine on the 135th day before the primary election which parties have qualified, §6460 requires that the Secretary of State's determination be based on the registration count made by the County Clerks 19 days before, i.e., on the 154th day before the primary. While there is no statute comparable to §6460 to determine the deadline for submission of petitions, Edward G. Arnold, Elections Assistant to the Secretary of State, stated in deposition that petitions had to be

submitted 184 days prior to the primary in order to be certified by the 135th day. Since the primary is held five months before the general election, aspiring parties must obtain the requisite level of support either some 300 days or some 330 days prior to the general election, depending on whether they seek to qualify by registration or by petition.

Appellants contend that the requirements of §6430 are so burdensome as to infringe their First Amendment rights, and the associated First Amendment rights of the voters. Appellants submitted evidence showing that the demands of §6430 have rarely been met. The registration requirement has been met only three times in history, first in 1938 by the Townsend Party (at which time the primary was held in August and the deadline was only 75 days before), and then by the Peace and Freedom and American Independent Parties in 1968. The latter parties centered their campaigns around the war in Vietnam and the politics of Gov. George C. Wallace, respectively. The petition route has been met only once, by Henry Wallace's Progressive Party in 1948. No other state has a petition requirement which remotely approaches the numbers involved in §6430(d). The next highest number of signatures needed is in Georgia, where about 100,000 signatures (5% of the pool of eligible signers) are required. In Georgia, the petition expresses far less commitment and is due far later than in California. No other state provides for party qualification by registration, but in fact if a 1% registration were required in every state for a party to be on the ballot, the only third parties which would now be on the ballot are the Conservative and Liberal Parties in New York.[3]

[3] See Affidavit of Richard Winger, Exhibit 1 to Appellants motion for summary judgment, at ¶ 13.

Appellants also showed that historical experience was that crowded general election ballots are extremely rare, even in states with the most trivial requirements. For example, appellants established that as of November 1975, when the motions for summary judgment were briefed, there had been only six instances since 1891 throughout the United States in which more than eight parties appeared on a statewide general election ballot. Appellants also presented evidence that the early deadlines created by §6430, which necessitate the gathering of support almost one year before the ensuing general election, posed a severe burden because of the lack of interest in politics so long before the election, and due to the fact that issues and candidates for ensuing election are poorly established at so early a date.

Appellee pointed out that two parties had complied with §6430(c) as late as 1968, and argued that the fact that initiative petitions requiring 5% or 8% signatures (depending on whether they sought to amend a statute or the State Constitution) were frequently on the ballot in California. She argued therefore that a 10% petition should not be impossible. Appellants contended that there are inherent differences between initiative petitions and new party petitions, and noted that of the 19 initiatives cited by appellee, all but two were on the November general election ballot.

Petitions for initiatives on the November ballot would ordinarily be circulated for signature until late spring or early summer; petitions for initiatives on the primary ballot would be due as early as petitions for new party qualification.

Appellants next argued that §6430(a), (d) par. 2 permits already-qualified parties to retain their qualification on a lesser showing of support than that required

of aspiring nonqualified parties, and therefore discriminates unconstitutionally in favor of the already-established parties. Section 6430(a), (d) par. 2 provides that parties which participated in the preceeding primary may remain qualified by meeting a twofold test: first, winning at least 2% of the vote for any one of their statewide candidates, and second, maintaining registration equal to one-fifteenth of one percent of the statewide total. Appellants submitted evidence that it was far easier to meet these two requirements than it was to meet either of the requirements for qualifying in the first place. This evidence included testimony by the delegates of both the Peace and Freedom and American Independent Parties to the California Joint Legislative Committee on Election Law Reform, as to the relative difficulty and expenditure of resources necessary in the experience of those two parties to originally win, and then retain, their ballot position. The evidence also included a summary of historical experience showing that parties, once qualified, are very rarely disqualified, and that third parties have retained their qualified status in California far more often than new parties have accomplished their initial qualification.

Appellee contended that it was natural for parties to retain qualification more easily, since they had made the initial investment in support required in the initial qualification drive.

The District Court rejected all of appellants' contentions. It found the 1% registration constitutional in view of this Court's approval in *American Party of Texas v. White, supra*, of a 1% petition requirement, and justified the deadlines as being necessary to the mechanical functioning of the California primary system. Judge Browning's separate opinion found it doubtful that §6430 was constitutional, largely because of the early deadline and the difference in commitment

between registration and petition-signing, but due to equitable considerations related to relief he concurred in the denial of all relief.

The third question presented by appellants arose from the fact that §6430 provides for ballot access for parties on a statewide basis only. After granting appellee's motion for summary judgment, the District Court directed appellants to attack the specific statutes which prohibit party candidates in district elections in the absence of statewide party qualifications.

The only method to obtain ballot status in California other than §6430 is the "Independent nominations" route, found in §§6800 et seq. and reprinted at pp. 36a through 41a of the Appendix. It was attacked in *Storer v. Brown, supra*, and after this Court's remand it was amended to lower the petition requirements to 1% for statewide candidates and 3% for district candidates, to lengthen the amount of time available for signature-gathering, and to expand the pool of available signers. Despite its name, this route is not limited to true political independents, and appellee has repeatedly informed appellants and the District Court that appellants were entitled to use §§6800 et seq. for their district and state-wide candidates.

However, candidates who qualify pursuant to §6800 and who are candidates of nonqualified parties may not have their party name printed adjacent to their name on the ballot, for §10210 ordains that for such candidates "the word 'Independent' shall be printed instead of the name of a political party." Appellants contend that this requirement infringes their First Amendment voting and associational rights, as well as those of the voters, by requiring that a deceptive word be printed in the space normally reserved for the printing of political affiliations, and that it denies them equal protection of the laws by allowing qualified party candidates and true

independents to have accurate descriptions of their affiliations while denying that right to candidates of nonqualified parties.

Appellants presented evidence of the risk of voter confusion arising from the use of the word "Independent" to describe all candidates of nonqualified parties, and of the additional confusion between the word "independent" and "American Independent" Party. Appellee asserted a compelling state interest in preventing the growth of regional political parties, and pointed out that the form of the petitions prescribed by law for §6800 candidates did not inform signers of the candidate's political party affiliation.

The District Court rejected those interests as justifying the burden on voting rights posed by §10210, but refused to grant any injunctive relief because of the nearness of the election,[4] and it refused to grant even declaratory relief as to statewide candidates qualified under §6800 on the theory that §6430 provided a constitutional alternative method for them to get their names and parties on the ballot.

The judgment of the Court, entered Sept. 30, 1976, and reprinted at page 28a of the Appendix, granted declaratory relief as to the constitutionality of §10210 as applied to appellants who were candidates in district elections. The judgment denied all other relief, and it is from the denial of all other relief that appellants appeal. Specifically, appellants appeal from (1) the denial of declaratory and injunctive relief as to the constitutionality of §6430; (2) the denial of declaratory and injunctive relief as to the constitutionality of

[4] Appellee herein, the Secretary of State of the State of California, has herself appealed to the Court of Appeals for the Ninth Circuit from the District Court's grant of declaratory relief that §10210 is unconstitutional as it applies to candidates of nonqualified parties for district offices.

§10210 for appellants who are statewide candidates, and for their political parties; (3) the denial of injunctive relief for appellants who are candidates for district offices.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

THE COURT BELOW ERRED IN DECIDING THIS CASE ON THE BASIS OF A "LITMUS-PAPER" TEST OF PERCENTAGES, RATHER THAN ON THE BASIS OF THE TOTALITY OF CIRCUMSTANCES, INCLUDING THE DEGREE OF COMMITMENT REQUIRED, THE DEADLINE BY WHICH IT MUST BE MADE, AND WHETHER THIRD PARTIES HAVE QUALIFIED "WITH SOME REGULARITY."

California Elections Code §6430 requires third political parties to meet the most stringent test of any in the United States in order to qualify for the ballot. To qualify by petition, California requires the highest percent in the United States, double the highest percent ever approved heretofore. That requirement, in absolute numbers, is more than six times the highest number required in any other state. No other state provides for qualification by registration, and the percent of registrants California requires would today be met by only two third parties in only one state in the Union. Moreover this large numerical showing must be made by a deadline months earlier than any deadline ever approved and months earlier than in any other state, indeed, even earlier than the "very early" deadline struck down in *Williams v. Rhodes*, 393 U.S. 23 (1968). 23 (1968).

Appellants urge that §6430 places a substantial burden on their First Amendment rights to organize as a party and campaign for office, as well as posing a burden on the First Amendment rights of the voters themselves. It is well established that state ballot access statutes must be strictly scrutinized, and that "their validity depends on whether they are necessary to further compelling state interests." *American Party of Texas v. White, supra*, at 780.

The decision of the District Court upholding §6430 conflicts with applicable decisions of this Court, in that it explicitly rejects the proper methodology elaborated by this Court, and instead substitutes the kind of "litmus-paper" methodology against which this Court has warned. The District Court decision also creates a conflict among the several three-judge courts that have recently considered challenges to state election law statutes based at least in part on the earliness of their deadlines. This Court has already noted probable jurisdiction in one of those cases, *Mandel v. Bradley*, prob. juris. noted, 45 U.S.L.W. 3248 (1976). There are, therefore, compelling reasons for this Court to note probable jurisdiction in this matter.

This Court has generally judged ballot access statutes in large measure by their practical effect on aspiring parties or candidates. Where the effect has been, with rare exceptions, to stifle access, the Court has struck down the offending statutes. The Court explained its methodology in the course of remanding one such case to a three-judge court for further consideration:

> [I]n the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, it not always an unerring, guide; it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not.

Storer v. Brown, supra, at 742 (1974). Indeed, the court specifically warned that:

> the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made.

Id., at 730.

The only recent instances of party qualification are the Peace and Freedom and American Independent Parties in 1968, nearly a decade ago. This parties involved extraordinary issues and personalities. The Peace and Freedom Party, for example, arose due to the longest war in American history, which caused a major split in the Democratic Party. Eugene McCarthy was not perceived as posing a serious challenge to President Johnson's politics until March 1968; yet registrations for an antiwar party were due by early January 1968. The American Independent Party was, of course, led by Gov. George C. Wallace, whose popularity in 1968 was such that many commentators feared he would deadlock the Electoral College. Appellants' evidence, however, is that he found it necessary to spend three full months and $500,000 in California to assure a place on the ballot. In *Jenness v. Fortson*, 403 U.S. 431 (1971) and *American Party of Texas, supra*, political parties had qualified in less tumultous years than 1968.

Plainly third parties do not qualify with any regularity in California. Appellee agrees with this as a statement of fact. She has noted that

> third parties can only gain meaningful voter support (especially in a state such as California with a huge population scattered over a large diverse land area) when the established parties are unresponsive to many voters. . . . [I]n California a political group only gains significant voter support when the established parties are not performing satisfactorily and the voters are looking for new solutions.

In fact, the American two party system has been quite stable over time, and it is quite rare that American voters desert the major parties in droves. Yet it is only in such times that a third party can qualify in California. Thus §6430 falls squarely in the definition of an unconstitutional statute set forth in *Storer v. Brown, supra.*

Appellee and the District Court, however, both expressly rejected appellants' reliance on the *Storer* test. The District Court explained only that *Storer* involved "different problems." Appendix, at 6a. This Court's analysis in *Storer* indicates the contrary. *Storer* is replete with references to *Williams v. Rhodes, supra*, and *Jenness v. Fortson, supra*, both of which involved party qualification questions. The Court's analysis in *Storer* of the problems of independent candidate qualification problems is interwoven with references to the party qualification cases. For example, a key element in the Court's decision in *Storer* was the fact that the pool of eligible signatories was reduced after the primary election. This Court then noted that the effective percent required may be "in excess of the 5% we said in *Jenness* was higher than the requirement imposed by most state election codes." *Storer v. Brown, supra*, at 739. The corresponding footnote

referred to several party qualification cases. The District Court was therefore in error when it refused to apply the test enunciated by this Court in *Storer.*

Instead of applying the "some regularity" test, the District Court read *American Party of Texas v. White, supra* as "endors[ing] the use of a percentage requirement" and as stamping one percent as a "lenient" requirement. In doing so, the District Court followed just the kind of "litmus-paper" test rejected in *Storer*. For example, the District Court did not consider the difference in voter commitment between a one percent *petition* requirement and a one percent *registration* requirement. Indeed, the petition in the Texas case did not even require the voter to say that he supported or intended to vote for the party. In *Jenness*, too, the 5% petition was justified by this Court in large measure because of the feeble voter commitment it required. Voter registration in California is different. It is a sworn statement of intention to affiliate with the party. The District Court did not evaluate this difference.

The District Court also failed to analyze the impact of the early California deadline. Ohion's February deadline was described as "very early" in *Williams v. Rhodes, supra*, at 33, because it fell before issues or candidates had crystallized. But California has an even earlier deadline. Under both the Texas and Georgia statutes upheld by this Court, petitions could be gathered up into June. In California, registrations must be completed by early January and petitions by early December. Yet the District Court did not evaluate the difficulty of obtaining the registration figure in light of the deadline. Instead it excused the deadline on three grounds: (1) Since California requires all "parties" to have a primary, the lead time is necessary for the mechanics of the primary; (2) "California does not

ignore registrations obtained before any given date"; (3) "None of the parties have made any factual representation that they could reach this requirement if the cutoff date were a month or so closer to the primary election."

Appellants contend that by requiring all parties, large and small alike, to participate in a statewide primary, California commits the "grossest discrimination" of treating different things alike about which this Court warned in *Jenness v. Fortson, supra*, at 442. And Appellants have pointed out that many other petition and diverse mechanical deadlines fall far closer to the primary than the registration requirement. The key point, however, is that assuming *arguendo* that California may constitutionally require a primary for all political parties, and that California needs such long lead time for mechanical reasons, then surely the amount of support which may be constitutionally required must be judged in light of the deadline. This the District Court did not do.

While it is true that Appellants might have attempted to qualify for the November 1976 general election by starting to gather registrations as early as, say, January 1975, this provides scant solace, for there is very little interest in politics in non-election years in general, and it is even harder to interest voters in an election so far ahead (especially when they have just finished an election).

Finally, the District Court's purported "as applied" analysis further underlines its misunderstanding of these cases. Appellants complain of the total effect of an overall statute; a statute with an early deadline *and* high numerical requirements. The Court might be justified in avoiding a decision on the constitutionality of a statute if Appellants failed some plainly constitutional test, but that is not the case. A February deadline would not be

clearly constitutional, particularly in conjunction with California's high numerosity requirement.

Judge Browning of the Court of Appeals for the Ninth Circuit noted the difference between petition and registration and the severe impact of the early deadline in his separate opinion in which he found it "doubtful" that §6430 is constitutional. The opinion of the District Court, however, failed to evaluate the total effect of degree of commitment required, numerosity, and deadline, and instead adopted a "litmus-paper" test. It is therefore in conflict with the applicable decisions of this Court on these important questions of Constitutional law, and its decision deserves plenary consideration.

A second reason for plenary review of this case is to resolve the conflict which has arisen among the several three-judge District Courts which have recently considered ballot access cases. In *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975) (three-judge court), *aff'd summarily sub. nom. Tucker v. Salera*, 424 U.S. 959 (1976), a Pennsylvania statute requiring petitions for independent candidates to be submitted by April of the election year was struck down on the ground that the deadline was too remote from the general election, before issues or candidates have crystallized, and therefore an excessive burden on the plaintiff candidates. Likewise, in *Bradley v. Maryland*, ____ F. Supp. ____ (D. Md. 1976) (three-judge court), *prob. juris. noted sub. nom. Mandel v. Bradley*, 45 U.S.L.W. 3248 (No. 76-128) (1976), a Maryland statute with a March deadline for petitions for independent candidates was struck down. Since the Court has already noted probable jurisdiction in that case, to grant plenary review in this one, where the results below are so different, would enable the Court to make a more complete exposition of the law regarding deadlines for ballot access requirements.

There are numerous other cases as well in conflict with the decision of the District Court below. In *Lendall v. Jernigan*, ____ F. Supp. ____ (E.D. Ark. 1976) (three-judge court), the Court struck down an April deadline for petitions for independent candidates, and suggested that the state legislature review the deadline for political parties as well.

In *American Party v. Jernigan*, ____ F. Supp. ____ (E.D. Ark., Jan. 7, 1977) (three-judge court), the Arkansas law establishing a March filing deadline for petitions for political parties was struck down, as was the 7% petition requirement–despite the fact that Arkansas, too, requires all parties to participate in a primary.[5]

In *LaRouche v. Guzzi*, 417 F. Supp. 444 (D. Mass., 1976) (three-judge court), the court upheld a July petition filing date for independents and third party candidates by distinguishing it from the much earlier deadlines struck down in *Williams v. Rhodes* and *Salera v. Tucker*. Finally, in *MacBride v. Exon*, ____ F. Supp. ____ (D. Neb., Sept. 3, 1976), the court invalidated a Nebraska scheme strikingly like California's. It required third parties to hold a primary and to submit qualification petitions nine months prior to the general election (on approximately Feb. 11). The Court found invalid both the primary requirement and the early deadline. (Reprinted at Appendix, p. 44.).[6]

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[5] Appellants have not yet obtained a copy of this decision, but heard its text by telephone.

[6] The text of the opinion does not reveal the fact, established in the record below, that in Nebraska, only some 4,500 signatures, about 0.65% of the eligible pool, were required. In California, to qualify by petition, Mr. MacBride's Libertarian Party would have had to submit approximately 636,000 signatures, or just under 10% of the eligible pool, by early December.

It is plain that the decision of the District Court herein conflicts with all the decisions cited above. Every deadline of April or earlier which has ever been considered has been struck down. And there have been a large number of cases considering such deadline questions. If the decision here appealed from is correct, then most of the cases cited above are incorrect. Surely this confusion should be cleared up. The resolution of such conflicts is a major function of plenary review.

The District Court did not discuss the 10% petition route, because it found that the 1% registration route was constitutional. The constitutionality of a 10% petition requirement, standing alone, is doubtful, especially in view of this Court's expressed reluctance to approve anything substantially higher than the 5% accepted in *Jenness*, where the deadline was far later and the expression of commitment in the petition far less than is required in California. Superficially, however, a one percent registration requirement does seem appealing. After all, one is the lowest integer.

Plainly, however, registration with a party implies far more commitment than merely signing a petition asking that the party's name be printed on the ballot. How much more commitment may best be seen from the fact, noted before, that were a 1% registration requirement applied in all states, only the Liberal and Conservative Parties in New York State would meet it. Neither the Peace and Freedom nor the American Independent Parties have had 1% registration since mid-1968, and the Peace and Freedom delegate to the California Joint Legislative Committee on Election Law Reform, Lewis McCammon, testified in his affidavit that he believed Peace and Freedom now would be unable to attain a 1% registration level. The same is almost certainly true of the American Independent Party. A 1% registration requirement may appear

reasonable or "lenient" on the surface. But one cannot judge its true effect without the facts, and the facts show that if that test were applied across the land, it would reduce party politics to a duopoly in 49 States. Appellants do not believe that the Constitution permits the two major parties to establish such a stranglehold not withstanding the superficial "leniency" of the standard.

This is especially so since Appellee produced no evidence that California would be flooded with a "laundry-list" of parties if its requirements were eased. Appellants have already noted that there had been only six instances since 1891 anywhere in the United States where there were more than eight political parties on a state-wide ballot. Considering the thousands of opportunities for party proliferation in all the elections held in all the states since 1891, the risk of a "laundry-list" ballot is extremely small. The State must present something more than speculation to justify its harsh restrictions, and it has not.[7]

Instead of demonstrating the State's need for Section 6430, Appellee has questioned the seriousness of

[7] Appellants question California's sincerity in asserting its interest in avoiding voter confusion arising from ballot overcrowding. The petition requirement is trivial (65 signatures) for a candidate seeking a place on the primary ballot of a qualified party. As a result, since 1910 there have been well over 100 primary contests in California with over 8 candidates. The risk of voter confusion is greater in the primary election, since voters there are faced simply with a long list of names. In a general election, the risk of voter confusion is minimized by party labels which help voters distinguish between candidates. The State should not be permitted to argue its great concern with ballot overcrowding where it almost never occurs when it is so indifferent to ballot overcrowding where it has frequently occurred.

Appellant political parties. In fact, Appellant La Raza Unida Party has at times in recent years had more registrants than one of the minor qualified parties in California. Its Texas branch has met the requirements upheld in *American Party of Texas*, as has the Socialist Workers Party. The Socialist Workers and Libertarian Parties both secured over 100,000 signatures for their Presidential candidates last November, qualifying them for the ballot under §6800.[8] The Presidential candidate of the Libertarian candidate, Appellant Roger MacBride, outpolled the Presidential candidates of both the Peace and Freedom and American Independent Parties. In sum, Appellant political parties have demonstrated significant voter support when given a reasonable opportunity to do so.

Finally, Appellants anticipate that Appellee will argue that this Court should decline to review this case because California has recently enacted a postcard registration law. Although postcard registration may ameliorate some of the mechanical problems of registration (i.e., the need for a registrar), it does not affect the commitment inherent in registering with a party, or the deadline by which it must be made, and it is wholly speculative whether the postcard registration law will ease the task of obtaining a 1% registration. Indeed, the change affects only one minor factor of the many factors which make the California registration law so restrictive. To refrain from now deciding the constitutionality of §6430 would mean that Appellants must wait some undetermined amount of time before drawing the lesson of experience to which the Court referred in *Storer*. How long is that to be? It is not

[8] Due to §10210, however, these candidates were not permitted to have their party label printed next to their names. See *infra* at page 25. The Senatorial candidate of the Socialist Workers Party, Appellant Musa, also so qualified, as did legislative district candidates of La Raza Unida and The Libertarian Party.

reasonable that Appellants rights in so fundamental an area as voting should be left in limbo for an indeterminate time on the speculation that the change from personal to postcard registration will make so great a difference.

II.

THE DISTRICT COURT IGNORED SEVERAL DECISIONS OF THIS COURT IN DISREGARDING THE FACT THAT CALIFORNIA PERMITS ALREADY-ESTABLISHED PARTIES TO REMAIN ON THE BALLOT WITH A LESSER SHOWING OF SUPPORT THAN REQUIRED OF NON-QUALIFIED PARTIES TO GET ON THE BALLOT FOR THE FIRST TIME.

It has been clear at least since *Williams v. Rhodes, supra*, that in the matter of ballot qualification requirements, a State may not discriminate against unqualified third parties by making it easier for established parties to stay on the ballot than for third parties to get on the ballot. The Ohio scheme was condemned not only because it made it so difficult for a new party to qualify, but also because it permitted established parties to remain on the ballot by obtaining 10% of the vote in the last gubernatorial election while requiring new parties to obtain petition signatures equal to 15% of the voters in the last gubernatorial election. The Court found that established parties "face substantially smaller burdens," *Williams v. Rhodes, supra*, at 25, and therefore found the statute to violate the Equal Protection Clause. Subsequent cases have confirmed that placing a heavier burden on one classification of political party than on another may be violative of the Fourteenth Amendment. See, e.g.,

Communist Party of Indiana v. Whitcomb, 414 U.S. 453 (1974). Cases finding the burden not unequal have reaffirmed the principle, e.g., *Jenness v. Fortson, supra, American Party of Texas v. White, supra.*

In California, an already-qualified party retains its place on the ballot by doing two things: (a) it must maintain registration equal to one fifteenth of one percent of the statewide total; and (b) it must poll at least 2% of the statewide vote for any of its candidates for statewide office. Elections Code §6430(a), (d) par. 2. Previously unqualified parties must either obtain registrations equal to 1% of the vote at the last gubernatorial election, §6430(c), or must obtain petition signatures equal to 10% of the same base, §6430(d) par. 1.

Appellants' evidence showed that it is far more burdensome to fulfill either of the requirements of §§6430(c) or (d). This included the testimony of the delegates of both the Peace and Freedom and American Independent Parties to the Joint Legislative Committee. Both men agreed that it required vastly more time, money and effort for them to qualify initially than it had been to maintain their qualification. Both agreed that their registrations had fallen below 1% and were unlikely to rise back above it. And both were testifying against their own interest, for if §6430 is found unconstitutional, their parties will likely face additional competition.

Appellants also submitted statistical evidence showing that in California parties other than the Republican and Democratic Parties had met the test to remain qualified 38 times and failed only rarely, while parties have met the initial test only four times.

The District Court, however, completely disregarded this evidence, and disposed of Appellants Equal Protection claim as follows:

> The requirements for established and new parties, however, are not meaningfully comparable, for a party must first qualify for the ballot before it needs to pass the test for staying on the ballot. The two percent of the vote requirement is an additional test imposed only after the party is on the ballot, and is not an alternative by which parties can avoid meeting the registration requirement.

Appendix, page 8a.

The District Court's reasoning, however, completely eliminates the possibility of an Equal Protection claim, because it will always be true that a party must first qualify for the ballot before it needs to pass the test for staying on. By rejecting the possibility of an Equal Protection claim arising from the relative difficulty of getting on and staying on the ballot, the District Court is in conflict with the applicable decisions of this Court. The District Court has in fact wholly written off one entire legal theory of Constitutional right which has been accepted by this Court repeatedly over the last ten years.

The fact that established parties must meet a two-fold test whereas new parties must meet a one-fold test does not make comparison impossible or meaningless. Courts can still take evidence, judge the relative burdens, and make the "hard decisions" to which this Court referred in *Storer v. Brown, supra*, at 724. For example, in *Baird v. Davoren*, 346 F. Supp. 115 (D. Mass. 1972) (three-judge court), the court invalidated a Massachusetts law requiring new parties to obtain petitions signed by 3% of the last gubernatorial vote, but allowing already-qualified parties to stay on the ballot by obtaining 0.1% of the vote for governor in three successive elections. The fact that this put a three-fold test against a one-fold test did not prevent

the court from evaluating the relative burdens. A prime factor in its evaluation was the fact that the 3% test had been met only four times, while the 0.1% test had been met 36 times. The facts here are strikingly similar.

Courts often differ, of course, in their evaluation of the relative burdens. But the court below did not even essay an evaluation. It rejected the Equal Protection claim outright. In doing so it plainly contradicted the decisions of this Court, and its decision deserves plenary consideration.

III.

CALIFORNIA HAS NO COMPELLING STATE INTEREST IN PROHIBITING CANDIDATES WHO HAVE QUALIFIED FOR THE BALLOT PURSUANT TO ELECTIONS CODE §6800 FROM PRINTING THEIR ACTUAL POLITICAL PARTY AFFILIATION ADJACENT TO THEIR NAMES ON THE BALLOT, AND THE COURT BELOW ERRED IN EXCUSING CALIFORNIA'S PROHIBITION ON THE GROUND THAT CALIFORNIA PERMITS AN ALTERNATE ROUTE FOR BALLOT ACCESS.

Several Courts have considered the great importance of statutes regulating ballot descriptions. In *Anderson v. Martin*, 375 U.S. 399 (1964), this Court struck down a Louisiana statute requiring that every candidate's race be stated on the ballot. The Court noted that ballot descriptions affect "the most crucial stage in the electoral process–the instant before the vote is cast." *Id.*, at 402. The California Supreme Court has also recently reaffirmed that state regulation of Ballot descriptions must be strictly scrutinized for Constitutional infirmities in view of the fundamental importance

of the right to be a candidate and the right to vote. Thus, in *Gould v. Grubb*, 14 Cal.3d 661 (1975), that Court invalidated a statute requiring that incumbents' names be printed in the first position on the ballot. The Court referred to numerous studies establishing the advantage to the incombent of appearing in the first position, and found that California discriminated unconstitutionally in favor of incumbents by granting that position.

Appellants challenge §10210, which requires candidates nominated by petition under §6800 to have the word "Independent" adjacent to their names, on several grounds. It is a burden on the First Amendment right to vote and be a candidate, for it deprives the voter of important relevant information about a candidate, namely his political party affiliation, and instead gives the voter deceptive information on that subject. It deprives candidates of the ability to communicate that vital information at the "crucial stage," and instead burdens their conscience by requiring their names to bear political party description in which they do not believe. In addition, §10210 discriminates against candidates of nonqualified parties under §6800 because it permits all other candidates to have accurate descriptions of their political affiliation.

The District Court agreed that §10210 "substantially burdens the right to knowledgeably vote for candidates of the plaintiff political parties" and that therefore its validity "depends on whether it is necessary to further a compelling state interest." Appendix, at p. 21a. California advanced two classes of interest. First, California argued that §10210 prevented the development of regional political parties. To this the Court responded that §6800 permits regional parties or candidates, and that the soundest way to deal with the problem of regionalism is to promote open discussion

and plain labeling of regional parties. Second, California asserted an interest in avoiding voter confusion arising from such facts as the absence of the party name in the officially-designated petitions circulated by would-be candidates under §6800. The Court noted quite properly that those interests could be served equally well by far more narrowly drawn statutes.

Therefore the Court declared §10210 unconstitutional as it applies to candidates for district office. However, the Court refused to declare §10210 unconstitutional as applied to candidates for statewide office on the theory that §6430 provided a constitutional alternative means by which candidates for statewide office could have their party affiliation printed next to their name. In doing so, the Court flew in the face of its own analysis of the burden placed on the franchise by §10210 and the weakness of California's claim that the provision is necessary to further compelling interests. Its logic in doing so is so plainly incorrect as to warrant summary reversal by this Court.

Throughout these proceedings, California has maintained that the "independent nominations" procedure of §6800 provided an alternate route of ballot access for the appellant political parties and their candidates. Indeed, after §6800 was liberalized in the summer of 1976, counsel for appellee wrote to the District Court to specifically call to its attention how candidates of nonqualified parties now had this much easier avenue of access. California has never claimed that §6800 is limited to true political independents, and has in fact argued the contrary.

In sum, California offers a choice: a party may seek state-wide ballot status, thereby gaining access for all its candidates, or it may elect to meet the numerically easier petition requirements of §6800 but repeat the

process for each candidate and each election. But section 10210 imposes an unconstitutional condition on the exercise of the choice which the State itself has extended. The condition is unconstitutional because, as the District Court found, it substantially burdens First Amendment rights and is unnecessary to further compelling state interests. Under these circumstances, the fact that an alternate route to the ballot exists is simply irrelevant.

The briefest consideration of the result argued for by California reveals its absurdity. In the place reserved for political labels, the State insists on placing a misleading label. Whatever the State's interest in assuring that voters be aware of the political affiliation of candidates whose petitions they sign, surely that interest is greater in assuring that voters be aware of the political affiliation of candidates for whom they are voting.

Indeed, it is so well established today that any law or regulation substantially burdening First Amendment rights must be justified in terms of specific compelling state interests, on its own, that there is never any discussion whether another mode of expression might be a suitable substitute. For example, regulations governing political activity on a military base are justified in terms of needs of discipline, separation of military and civilian functions, and the like, and not on the grounds that political activity is allowed off the base. *Greer v. Spock*, 424 U.S. 828 (1976). The District Court, after correctly analyzing the burden on First Amendment rights and the interests proferred by the State, correctly concluded §10210 was not necessary to protect those interests. Its decision not to declare §10210 unconstitutional as applied to statewide candidates is, however, in conflict with well-established decisions of this Court of hornbook Constitutional law. The District Court's analysis of the interests involved was clearly correct; its conclusion,

however, is so clearly in error as to warrant summary reversal.

CONCLUSION

In summary, Appellants urge that the District Court mistakenly applied a "litmus-paper" test instead of making the "hard judgment" required by *Storer* in judging the burden on First Amendment rights of §6430; that the District Court's logic in analyzing Appellants Equal Protection claim in fact read that claim, clearly recognized by the Supreme Court, out of existence; and finally that the District Court's treatment of §10210, as applied to statewide candidates, contradicts the most fundamental principles of Constitutional law by upholding a statute which by the District Court's own analysis substantially burdens First Amendment rights without being necessary to further compelling state interests. The District Court's treatment of §10210, moreover, sustains a statute which requires the ballot to contain untrue and deceptive language.

The foregoing plainly demonstrates that this Court has jurisdiction of the appeal, and that the questions presented warrant plenary consideration.

Respectfully submitted,

KENNETH LEE STAHL
RAY HENDRICKSON
Counsel for Appellants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SOCIALIST WORKERS PARTY, et al.,

Plaintiffs,

vs.

MARCH FONG EU, Secretary of State
of the State of California,

Defendant.

NO. C-73-1165 ACW
(Three-Judge Court)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Five political parties and a number of voters and potential candidates have challenged the constitutionality of the California system governing access to the ballot by political parties. They seek to enjoin the operation of California Elections Code §§6430(c), (d), because they contend those sections place unreasonable burdens on ballot access in violation of plaintiffs' rights under the First and Fourteenth Amendments, and because the law improperly discriminates against minority political parties in violation of the Equal Protection Clause of the Fourteenth Amendment. A three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284. Presently before the Court are motions for summary judgment filed by both sides.

California law provides two alternative methods by which a party may qualify for the first time for a place on the primary election ballot. If the voters who have

registered as members of the party equal at least one percent of the entire state vote at the last gubernatorial election, Elections Code §6430(c), or if the party submits a petition signed by voters equalling at least ten percent of the entire state vote at the last gubernatorial election, Elections Code §6430(d), the party may participate in the primary election.[1] A party must qualify for participation in the primary election before it can participate in the ensuing general election.

Whether plaintiffs' challenge is viewed as claiming substantial burdens on First Amendment rights or as discriminatory against minority political parties, the validity of the statute depends on whether it furthers a compelling state interest. *American Party of Texas v. White*, 415 U.S. 767, 780 (1974). A state's vital interests in preserving the integrity of the electoral process and regulating the size of the ballot in order to avoid voter confusion permit it to require political parties appearing on the ballot to "demonstrate a

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[1] California Elections Code §6430

A party is qualified to participate in any primary election:

. . .(c) If on or before 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding guvernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election.

significant, measurable quantum of community support". *Id.* at 782. The Texas requirement that a party demonstrate support equal to one percent of the vote for governor at the last election was upheld by the Supreme Court. It furthered legitimate and compelling state interests while still providing a practical means of access to the ballot.

In reaching this conclusion, the Court analyzed several factors: First, all voters, however registered, could attend a party convention and be counted towards the one percent requirement. If not enough attended, petitions could be circulated for the 55 days ending 120 days prior to the election. While only those voters who had not voted for another party in the primary or attended another party's nominating convention could sign these petitions, the Court held it was not improper to restrict voters to participating in only one party's affairs prior to the general election. Second, 55 days was not an unreasonably short time to obtain the approximately 22,000 necessary signatures. Third, two parties had qualified for the ballot by this method for a recent election.

It is instructive to compare the Texas statutory scheme with one of the California statutes, Elections Code §6430(c), under attack here. California's one percent registration requirement has the following features: First, a person can only register in one party. Second, the necessary registrations (now, about 66,000) must be obtained 154 days prior to the primary election. Third, since the requirement was adopted in 1929, this method has been successfully used by three parties to get on the ballot—once in 1938 and twice in 1968.

Plaintiffs object that the number of signatures needed in California is higher than in any other state, but California is the largest state. *American Party of Texas v. White, supra,* endorsed the use of a percentage

requirement. In fact, that case characterized a one percent requirement as "lenient". 415 U.S. at 783 n.15.[2] In order to meet the one percent total, supporters of the new party must be voters registered as affiliated with that party. California is entitled to insist that new parties show a "measurable" amount of support, and registrations are a reasonable method of taking that measurement. While less precise methods of measurement, such as a petition procedure, are permissible, the state is not required to adopt those means when it is attempting to maintain the integrity of its electoral processes. The question, therefore, is whether California's one percent registration requirement actually operates as an impermissible roadblock against access to the ballot. *American Party of Texas v. White, supra,* 415 U.S. at 783.

The main difference between the Texas system approved by the Supreme Court and the California system lies in the time limits for obtaining signatures. While California Elections Code §6430(c) sets the 135th day before the primary election as the time for determining compliance with the statute, Elections Code §6460 operates to set that date back 19 days so that the required amount of registrations must be obtained 154 days prior to the primary election. Texas, on the other hand, did not start counting new party supporters until the day of the nominating conventions, which was also the day of the primaries for the major parties, and continued to allow the gathering of signatures until 120 days before the general election. Most of this difference in timing, however, is attributable to the fact that California requires parties

[2]It should be noted that the necessary percentage in California is defined as a proportion of the actual vote, and is therefore less than one percent of the total registered voters.

to participate in a primary election if they want to participate in the later general election.[3] This necessitates in California a registration cutoff date prior to the primary. Plaintiffs nevertheless allege that the length of time prior to the primary election is unnecessarily long and falls during a time of year when interest in political activity is at its lowest point. This, they claim, creates unnecessary difficulties in obtaining the required amount of registrations.

The California time limits must be put into their proper context. Unlike Texas, when measuring the support necessary to qualify for the ballot California does not ignore registrations obtained before any given date. A registration obtained subsequent to the cutoff date for the last primary will count towards meeting the requirement for the next primary. Plaintiffs filed this case in July of 1973. The last general election was in November of 1974, over a year before the plaintiffs filed their motion for summary judgment.[4] The plaintiff political parties have had ample time in which

[3]"The State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." *American Party of Texas v. White, supra,* 415 U.S. at 781. California requires all parties on the general election ballot to hold a primary election (at state expense). Apart from their attack on Elections Code §§6430(c), (d) as creating too restrictive qualifications for obtaining a place on the primary ballot, plaintiffs have not identified any feature of the primary election which operates to impermissibly burden their exercise of First Amendment rights.

[4]Some of the voters registered with the plaintiff parties may have had their registrations cancelled for not voting in the 1974 general election. Cal. Elections Code §§383(f), 386-387. Even making the drastic assumption that all such voters had their registrations cancelled, plaintiffs have still had over a year to obtain new registrations.

to obtain the necessary registrations. Yet none of the parties appear to be even close to meeting a one percent requirement, and only one could have met a one-half of one percent requirement at sometime in the past five years. None of the parties have made any factual representation that they could reach this requirement if the cutoff date were a month or so closer to the primary election. Under these circumstances, Elections Code §6430(c) as applied to the plaintiffs herein is valid. Cf. *Storer v. Brown*, 415 U.S. 724, 734 (1974).

Examination of the historical evidence does not change this conclusion. Plaintiffs cannot rely on the possibility that prior to 1968 the one percent registration route was not an effective means of obtaining a place on the ballot. The fact that two parties successfully used this method in 1968 shows that Elections Code §6430(c) has proven to be a real means of access to the ballot in recent years. Plaintiffs have not shown that any party, with the exception of the La Raza Unida Party, has made a serious effort since 1968 to obtain a ballot position through the registration route. The failure of one party in the last eight years to obtain the necessary registrations does not mean that Elections Code §§6430(c) has been an impermissible barrier to the electoral aspirations of new parties.[5]

Considering all these factors, the one percent registration requirement of Elections Code §6430(c)

[5]The Court cannot accept plaintiffs' contention that the challenged provision would be constitutional only if minority parties regularly obtained a position on the ballot. Plaintiffs derive such a proposition from *Storer v. Brown, supra*, 415 U.S. at 742, a case dealing with the different problems of independent candidates for single offices.

has been, by itself, a reasonable measure designed to protect a vital state interest. Plaintiffs are not entitled to an injunction placing them on the current primary ballot nor are they entitled to declaratory judgment that the law is unconstitutional.[6] Since the registration method for gaining access to the ballot has been a constitutionally valid independent alternative to the ten percent petition requirement of Elections Code §6430(d), there is no need to examine the validity of the latter section.

Plaintiffs also maintain that it is more difficult for parties not on the ballot to comply with the one percent registration requirement than it is for parties on previous ballots to continue to qualify for a place on the ballot. They claim such a situation violates the Equal Protection Clause by discriminating against minority parties.

As an alternative to satisfying the one percent registration or ten percent petition requirement, a party already on the general election ballot can qualify for the next primary election by maintaining a registration of at least one-fifteenth of one percent of the total state registration and obtaining at least two percent of the vote for a state office at the last gubernatorial election. California Elections Code §§6430(a), (d) par.

[6]Equitable relief with respect to future primary elections would be premature. Effective July 1, 1976, voter registration by postcard will be available in California. 1975 Cal. Stats. Ch. 704. While the validity of some parts of the new law may be debated, there is no doubt that it will significantly change the registration process. Discussions of the historical evidence and experiences in obtaining signatures before previous elections will probably be irrelevant to future ballot qualification efforts. Without any way to predict the effects of the new law, it would be inappropriate to render a decision on a challenge to Elections Code §6430(c) as it governs future primary elections.

2. The requirements for established and new parties, however, are not meaningfully comparable, for a party must first qualify for the ballot before it needs to pass the test for staying on the ballot. The two percent of the vote requirement is an additional test imposed only after the party is on the ballot, and is not an alternative by which parties can avoid meeting the registration requirement.[7]

Plaintiffs further claim that it is harder for a new party to get on the ballot than it is for an individual to get into a primary contest. The rules governing access to a primary contest, however, treat all parties equally, and the requirement would also apply to plaintiffs if they ever qualified for participation as a party in a

[7]It may be true that when California first adopted this type of requirement in 1913 that obtaining a percentage of the vote in the last election prior to adoption of the law was an alternative to the registration or petition method of getting on the ballot. At the time, a party was required to obtain three percent of the vote. Cal. Stats. 1913, c. 290, p. 1379. For present purposes, the Court will assume that the Republican and Democratic parties originally qualified for the ballot by virtue of obtaining three percent of the vote at the last election prior to adoption of the primary law. Plaintiffs have not shown that it was significantly easier in 1913 to obtain three percent of the vote than it is in 1975 to obtain one percent of the registrations, not have they shown that such an historical comparison is in any way meaningful. It is clear, however, that the present system does not presently discriminate between various parties in their attempts to first obtain a position on the ballot nor does it act to perpetuate the Republicans and Democrats as the sole parties on the ballot.

In addition, Texas made a distinction between getting on the ballot and staying on the ballot that parallels the California situation. The Texas system also involved a process by which parties obtaining two percent of the vote could qualify for the ballot while new parties had to follow the one percent route described previously. *American Party of Texas v. White, supra,* upheld this system against an equal protection challenge.

primary election. No denial of equal protection can be made out here.

This argument is also used by plaintiffs to purportedly show that the state's asserted interests in preventing voter confusion and ensuring adequate community support before placing a party on the ballot are not compelling interests because the state has itself made it relatively easy for large numbers of candidates to enter a primary contest. The state's actions, however, are not as inconsistent as plaintiffs suggest.

While the state may require a party to have adequate community support before the state will conduct a party primary at public expense and allow a party to run candidates for partisan offices, it is also in the state's interest to make sure that the party's candidate be a true representative of the party. One method for ensuring that is to make it relatively easy for party members to enter the party's primary so that intraparty disputes can be fully resolved. The state can nevertheless insist that parties afforded this privilege still represent a significant segment of the community. Cf. *Storer v. Brown, supra,* 415 U.S. at 735. The state has shown no inconsistency that would lead to a conclusion that it has abandoned the interests justifying Elections Code §6430(c).

Plaintiffs also complain that a party can qualify only for the statewide ballot. Parties cannot run a candidate under the party label in local partisan elections without first meeting statewide qualifications. Elections Code §§6430(c), (d), however, do not prohibit party candidates in local elections in the absence of a party's statewide qualification, nor does their validity depend in any way upon other statutes that do prohibit non-statewide parties.

At oral argument on the present motions, plaintiffs offered to amend their complaint to correctly designate

the statutes challenged in this part of their case. Since this issue had been raised, albeit imprecisely, in the original complaint and no prejudice to the defendant from an amendment is apparent, an amended complaint may be filed pursuant to FRCP Rule 15. It would be inappropriate to render a decision on this matter without an amended complaint because neither party has fully briefed the issues in light of the specific statutes involved. In order to insure proper consideration of plaintiffs' claim, the Court adopts the briefing schedule designated below. After receipt of the briefs, the Court will determine whether further oral argument is necessary.

ACCORDINGLY, IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is DENIED, and that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that plaintiffs have 30 days in which to amend their complaint to appropriately challenge California's prohibition of non-statewide parties. Plaintiffs shall file a motion for summary judgment on this issue at the same time as the amended complaint is filed. Defendant shall have 15 days from that filing to file an answer to the amended complaint and a response to plaintiffs' motion for summary judgment. Defendant may file a motion for summary judgment at the same time if she so desires. Plaintiffs shall have seven days from that filing to reply to defendant's response and/or motion for summary judgment. Upon receipt of all briefs, the matter will be deemed submitted unless the parties are notified otherwise.

DATED: June 7, 1976.

/s/ Albert C. Wollenberg
ALBERT C. WOLLENBERG
United States District Judge

/s/ William G. East
WILLIAM G. EAST
United States District Judge
/s/ by A.C.W.

SOCIALIST WORKERS PARTY v.
MARCH FONG EU – No. C-73-1165 ACW

BROWNING, Circuit Judge, concurring in the result:

I concur in the result. As the majority opinion concludes, it would be inappropriate to decide the constitutionality of the requirement that political parties must qualify for the ballot on a statewide basis until the complaint has been amended to define the issue more sharply and the issue has been fully briefed by the parties. The majority is also correct, in my opinion, in denying the prayer for an injunction requiring that the names of the plaintiff political parties be placed on the ballot, but I would base this holding entirely on general equitable principles governing declaratory and injunctive relief, and not upon the ground that the pertinent California statutes limiting access of new parties to the ballot are constitutional, which, to me, is doubtful.

Briefly, the basis for these doubts is as follows. California is one of only two states that has a petition requirement as high as 10 percent for minor parties; the other is South Dakota. All other states using a percentage petition standard requires significantly lower percentages. *See* Developments in the Law–Elections, 88 Harv. L. Rev. 1111, 1124-25 n. 11 (1975). Of the twenty states having petition requirements expressed in terms of absolute numbers of voter signatures, the state having the highest is Illinois, which requires a minor party to have 25,000 signatures to qualify for the statewide ballot. *Id.* In contrast, California's 10 percent petition requirement meant, for example, that between 1971 and 1974 statewide ballot status was available only to parties which could obtain 663,340 signatures. *Id.* at 1128 n. 29. Only one political party has ever

succeeded in meeting the 10 percent petition requirement. It is more burdensome than any heretofore approved by any court.

The alternate 1 percent registration requirement is employed only in California. Contrary to the majority's suggestion, the percentage element of this requirement did not receive the Supreme Court's approval in *American Party v. White*, 415 U.S. 767 (1974). The Supreme Court referred to a "lenient 1% *petition* requirement." *American Party v. White, supra,* 415 U.S. at 783 n. 15 (emphasis added). It seems safe to assume that a 1 percent petition standard. Registering as a party member requires a higher level of voter commitment and initiative than merely signing a petition.

But the real burden of California's registration requirement is not the percentage of voter registrations required, it is the deadline by which they must be obtained. This is the main difference between the California system and the Texas system approved in *American Party*. The majority fails to recognize the practical significance of this difference. The deadline for gathering the necessary support is six months earlier in California than in Texas. A political party seeking a place on the Texas ballot must qualify 20 days after the second Saturday in June, or 120 days prior to the general election. *See American Party v. White, supra,* 415 U.S. at 773-74 & n. 6. In Texas, party primaries and minor party precinct conventions are held on the same day. Under the Texas system, a minor party "is entitled to compete before the primary election *and* to count noses at its convention on primary day, just as the major parties and their candidates count their primary votes." *Id.* at 784 (emphasis in original). This was an important factor leading the count to conclude that Texas "affords minor political parties a real and

essentially equal opportunity for ballot qualification." *Id.* at 787-88; *see* The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 94 (1974). In contrast, a minor party attempting to qualify in California must do so 154 days before the primary, or between December 30 and January 6. Registrations must be gathered during a period (including the holidays) when political interest is low. Thus, the California registration requirement is significantly more restrictive than the Texas petition system because the former requires a higher level of commitment from voters, and because it requires this commitment at a time when political interest is low and the important issues have not yet crystallized. *See Williams v. Rhodes*, 393 U.S. 23, 33 (1968); *Lendell v. Bryant*, 387 F.Supp. 397, 402 (E.D. Ark. 1975) (three-judge court).

It is doubtful whether the California ballot access system is "necessary to further compelling state interests." *American Party v. White, supra,* 415 U.S. at 780.

In nearly a half century only one party has ever satisfied the 10 percent petition requirement and only three parties have successfully employed the 1 percent registration route. There is no indication that the integrity of the process would be threatened if access to the ballot in California were made considerably easier. As the Supreme Court has noted, the experience of many states "demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required." *Williams v. Rhodes, supra,* 393 U.S. at 33.

California also asserts an interest in protecting its political system against "splintered parties and unrestrained factionalism." *Storer v. Brown,* 415 U.S. 724, 736 (1974). The interest in preventing "unrestrained

factionalism" scarely justifies restrictions on ballot access which has given the two major parties a virtual duopoly for nearly 50 years. *See* Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 61-62 (1975).

I believe, however, that in the circumstances of this case, the court should not decide whether the present ballot access statute imposes an unconstitutional burden upon minor parties. Whether the statute is held to be valid or invalid, it would be inappropriate to grant plaintiffs the relief they seek for the June 1976 election, and, as the majority points out, equitable relief with respect to future primary elections would be premature.

Both declaratory and injunctive relief are equitable and discretionary. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Both can be denied without reaching the merits of the underlying controversy. *See PPG Industries, Inc. v. Continental Oil Co.*, 478 F.2d 674, 681 (5th Cir. 1973); *Democratic Central Committee v. D.C. Transit System, Inc.*, 459 F.2d 1178, 1181-82 (D.C. Cir. 1970) (Leventhal, J., concurring). This would be the better course in the present case, particularly in view of the admonition that constitutional questions should not be decided unnecessarily. *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136-37 (1946); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

It is highly doubtful whether any of the five plaintiffs could have met even an unquestionably constitutional registration requirement. Only one of the plaintiff parties could have met a one-half of 1 percent requirement at any time in the past five years. It would be contrary to the public interest to require that five parties be added to the statewide ballot at this time. It would be extremely burdensome if not impossible for

the state to comply with such a requirement at this late date, and compliance might well produce a significant amount of voter confusion. Courts generally have been reluctant to interfere with the election process at a point in time when to do so would involve serious risk of expense and delay. *See Smith v. Climer*, 341 F. Supp. 123, 125-26 (E.D. Ark. 1972) (three-judge court); *Silver v. Jordan*, 320 F. Supp. 1169, 1174-75 (D.C. Cal. 1970) (three-judge court); *Feinglass v. Reinecke*, 48 F. Supp. 438, 441-42 (N.D. Ill. 1942).

It is true that in *Williams v. Rhodes, supra*, the Court affirmed an order placing the American Independent Party on the ballot for the ensuing general election where the party had shown significant support by obtaining petition signatures from 15 percent of the qualified electors. But the *Williams* Court also denied a place on the ballot to the Socialist Labor Party because the Party's membership was small and it would have been impossible to place the Party on the ballot without serious disruption of the election process. *Id.* at 28, 34-35. So far as the June 1976 primary is concerned, the same result is called for in this case.

Effective July 1, 1976, California voters may register by postcard. 1975 Cal. Stats. ch. 704. No doubt the new statute will significantly facilitate the registration process. I agree with the majority that in these circumstances it would be inappropriate to render a decision on a challenge to Elections Code §6430(c) as applied to future primary elections. *See McCahill v. Borough of Fox Chapel*, 438 F.2d 213, 214-16 (3d Cir. 1971).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-73-1165 ACW
(Three-Judge Court)

SOCIALIST WORKERS PARTY, *et al.*,

Plaintiffs,

v.

MARCH FONG EU, Secretary of State
of the State of California,

Defendant.

ORDER PARTIALLY GRANTING PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AND PARTIALLY DISMISSING AMENDED COMPLAINT

This is the second part of a lawsuit by five political parties and a number of potential candidates asserting the unconstitutionality of the California statutes governing access to the ballot by political parties. By a previous order filed June 7, 1976, this Court rejected plaintiffs' challenge to the statutes, California Elections Code §§6430(c) and (d), governing access by political parties to the statewide primary and general election ballots. In its order, the Court gave plaintiffs leave to file an amended complaint to properly raise the issue of the state's prohibition of party designations for candidates in local partisan elections when the party to be

designated has not qualified for a place on the statewide ballot. Both sides have now moved for summary judgment on this issue as it has been presented in plaintiffs' amended complaint.

If a political party meets the requirements for a position on the primary election ballot that are set out in Elections Code §6430,[1] it is entitled to a position on the ballot throughout the entire state. Political parties qualified to participate in the primary are able to have their candidates in the general election identified on the ballot as representing the party. Elections Code §10210, par. 1.

If a party cannot qualify for the ballot on a statewide basis under Elections Code §6430, candidates representing that party may still attempt to be elected in two ways. First, the candidate may conduct a campaign for write-in votes.[2] Since a write-in candidate's name does not appear on the printed ballot distributed to voters, the write-in candidate can obviously never be identified on the ballot as the candidate of a particular political party. Second, the candidate may gain a place on the general election ballot through the "independent" nomination process outlined in Elections Code §§6800 *et seq.* In this context, "independent" merely means a method of gaining a place on the ballot other than through obtaining the nomination of a qualified party by

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[1] A political party or organization qualifying for participation in the primary election through Elections Code §6430 is referred to in the California Elections Code as a "party." Elections Code §39. This order will not employ such a restrictive definition of "party." Organized political groups that qualify under Elections Code §6430 will be referred to as qualified or statewide parties. All other political organizations will be referred to as non-qualifying or local parties.

[2] See, e.g., Elections Code §10204.

winning that party's primary contest. Both candidates truly independent of affiliation with any political party and candidates representing non-qualified parties can get on the ballot in this manner. However, Elections Code §10210, par. 3, prohibits all candidates placed on the general election ballot through the "independent" nomination process from having a party designation printed on the ballot. Instead, the word "independent" must be printed in lieu of a party's name. It is this feature of the election laws that is the focus of plaintiff's motion for summary judgment.[3]

In California, most local elections are conducted on a nonpartisan basis. Elections Code §41. However, there are partisan contests for election to the United States House of Representatives and to both branches of the California Legislature. All of these three positions are filled through elections in districts that encompass only a portion of the entire state. For these elections,

[3] In its entirety, Elections Code §10210 reads:

In the case of candidates for partisan office in a general election or in a special election to fill a vacancy in the office of Representative in Congress, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or immediately below the name, if there is not sufficient space to the right of the name, there shall be printed in eight-point roman lowercase type the name of the qualified political party with which the candidate is affiliated.

In the case of candidates for President and Vice President, the name of the party shall appear to the right of and equidistant from the pair of names of such candidates.

If for a general election any candidate has received the nomination of any additional party or parties, the name(s) shall be printed to the right of the name of the candidate's own party. Party names of a candidate shall be separated by commas. If a candidate has qualified for the ballot by virtue of an independent nomination, the word "Independent" shall be printed instead of the name of a political party in accordance with the above rules.

Elections Code §10210, par. 3, prohibits party designations on the general election ballot for candidates who may in fact be the candidate of a political party with significant support within the particular local district where the candidate is running. Only parties qualifying statewide can, through Elections Code §10210, par. 1, be identified as fielding a candidate in a local partisan election.

The individual plaintiffs who are members of non-qualifying parties and who are attempting to gain a place on the upcoming general election ballot through the "independent" nomination process claim in the amended complaint that Elections Code §10210 violates their rights of freedom of speech and association under the First and Fourteenth Amendments and their rights under the Equal Protection Clause of the Fourteenth Amendment by requiring an "inaccurate and arbitrary description of their political affiliation" after their name on the ballot while permitting candidates of parties which have qualified statewide under Elections Code §6430 to use "actual and accurate descriptions of their political affiliations." Amended Complaint, Par. 30(e).

The plaintiff political parties do not identify Elections Code §10210 as the source of California's prohibition against local political parties being identified on the ballot for local partisan elections. Instead, these plaintiffs allege that Elections code §§6430(c) and (d) are unconstitutional "in failing to make provisions for a party to qualify for ballot status on a district-by-district basis, rather than only on a statewide basis." Amended Complaint, Par. 30(d). In our previous order, this Court held that Elections Code §6430 did not prohibit local parties and that the validity of its requirements concerning statewide party qualification for the ballot did not depend on any other provisions of state law that

might prohibit local parties. It is difficult to understand how a statute silent as to plaintiffs' interest in local party ballot status could be the subject of an injunction against its operation. If California's prohibition of local parties is the result of a lack of enabling legislation rather than a statute specifically prohibiting such a result, there would seem to be no need for a three-judge court.

In this case, however, all parties to the litigation recognize that a non-qualifying political party may still place a candidate on the ballot by complying with the requirements of the "independent" nomination process. There is further recognition that Elections Code §10210 prohibits the non-qualifying parties from having their names on the ballot following the candidates they have succeeded in placing on the ballot through the "independent" nomination process and that Elections Code §10210 thus prohibits local parties from appearing on the ballot. The present motions have been briefed by both sides as if the plaintiff political parties were challenging Elections Code §10210. Under these circumstances, it would be pointless to require a further amended complaint, and the Court will consider the plaintiff political parties to also challenge Elections Code §10210.

While the statute does not completely prohibit candidates of non-qualifying parties from appearing on the general election ballot, the prohibition of party designation that is at issue here cannot be considered an aspect of the state's supervisory responsibilities over elections that must be upheld if it has a rational relationship to a legitimate state end. The party itself can never appear on the ballot, and this is a substantial burden on the rights of its members to associate and organize for political purposes. In addition, this prohibition substantially burdens the right to knowledgeably

vote for candidates of the plaintiff political parties.[4] Cf. *Riddell v. National Democratic Party*, 508 F.2d 770 (5th Cir. 1975). Moreover, these substantial burdens are not placed on the qualified parties and their candidates or the rights of voters to knowledgeably choose those candidates. We conclude, as in the previous order in this case, that the validity of the statute challenged here depends on whether it is necessary to further a compelling state interest. *American Party of Texas v. White*, 415 U.S. 767, 780 (1974). Cf. *Buckley v. Valeo*, ____ U.S. ____ ,44 L.W. 4127, 4155 (1976). We therefore turn to the interests asserted by the state.

The state first asserts an important interest in encouraging party activity on a statewide basis. The occupants of the offices in question here do legislate for the state as a whole even though they are not elected on a statewide basis. The state reasons that by encouraging candidates and political groups to either attempt statewide qualification or affiliation with statewide parties, Elections Code §10210 will help to foster candidates for local offices having a non-parochial political perspective.

While the state may have such an interest, however, the Court cannot accept the proposition that this interest can be furthered by completely prohibiting the names of local parties from appearing on the general election ballot.[5] As discussed previously, California does in fact already permit candidates for local partisan offices who are not affiliated with any statewide party.

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[4] The restrictions aimed at the plaintiffs who are potential candidates must also be examined with respect to their impact on the voters. *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

[5] *Wood v. Putterman*, 316 F. Supp. 646 (D. Md. 1970), *affirmed* 400 U.S. 859 (1970), a case relied upon heavily by defendant, does not hold that local parties can be prohibited from appearing on the ballot.

These candidates can be the representatives of local political parties. In order to encourage statewide parties, California can create different routes to the ballot for candidates of statewide and local parties. That, however, is not the function of Elections Code §10210, for that statute comes into play only after a candidate of a local political party has qualified for the ballot. The state cannot promote a statewide perspective in its elected officials by depriving the voters of the ability to make an informed choice between candidates representing local and statewide interests and by prohibiting local parties with candidates already on the ballot from competing for votes on an equal basis with the statewide parties. We believe that the Fifth Circuit's comments in a case involving a state's overly restrictive assertion of its interest in party designations on the ballot is appropriate here. "It seems to us the proper course is for the political process to solve this problem—and that solution is not to try to ignore that factionalism in the state exists, but rather for the . . . factions to have the opportunity to pursue their own political objectives without undue hindrance by the state." *Riddell v. National Democratic Party, supra*, 508 F.2d at 778.[6]

The state also asserts an interest in providing its voters with "understandable" choices and in reducing voter confusion. The state does have a vital interest in insuring that parties listed on the ballot have a degree of community support and that the candidates selected by those parties have been chosen by democratic

[6] It is interesting to note that while those elected to the United States House of Representatives legislate for the benefit of the country as a whole, California asserts no interest in encouraging candidates for that office to affiliate with a national party.

methods. The state also has an interest in insuring that voters signing nominating petitions for "independent" candidates have been informed that the potential candidate is a representative of a particular political party. In short, the state does have legitimate and compelling interests in preserving the integrity of its electroal processes. See, e.g., *Storer v. Brown*, 415 U.S. 724 (1974).

While these are legitimate interests, there are means of accomplishing them that are far less restrictive than the present total prohibition of local party designations on the general election ballot. Many states have provisions for local parties to appear on the ballot, and California has not shown that any of the methods of local party qualification employed in these states are not capable of maintaining the integrity of the electoral process. Even important interests of the state must be protected by "means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley v. Valeo, supra*, 44 L.W. at 4134. The state's interests certainly are not promoted by a statute that encourages voter confusion by disguising the true affiliations of the "independent" candidates.

As a final ground in support of her motion for summary judgment, defendant argues that plaintiffs have sued the wrong defendant. She claims that Elections Code §10005 makes local elections officials responsible for providing ballots for the general election and that those officials are the proper defendants for this portion of plaintiffs' case. Defendant seeks to have this portion of plaintiffs' amended complaint dismissed because no local election officials have been joined as defendants.

Defendant's reliance on Elections Code §10005, however, is misplaced. That statute is purely ministerial in nature, for it provides that the local official:

> shall cause to be printed on [the ballots] the name of every candidate whose name has been certified to or filed with the proper officer pursuant to law and who, therefore, is entitled to a place on the appropriate ballot.

Under Elections Code §§6620, 6802, defendant is the state official who would certify to the county clerks the names of candidates for local partisan offices nominated through the "independent" nomination process and would certify their party designations as "Independent." If defendant was enjoined from following the dictates of Elections Code §10210 that have been challenged here, she would certify the correct political party designations of local party candidates, and she is therefore a proper defendant for this portion of the lawsuit.

Five individual plaintiffs in this case–Camejo, Reid, Musa, Macbride, and Bergland–are not seeking to qualify to run in the general election for any local partisan offices. Instead, they seek to run for offices to be voted on statewide–either President, Vice-President, or United States Senator. Elections Code §10210 also prevents a ballot designation of the party supporting them because the only way they will qualify for the ballot is through the "independent" nomination process. But in the case of these five plaintiffs, California law provided an alternative method by which they could have been nominated for a statewide race by a party that could have been designated on the ballot. That way is set out by Elections Code §6430 and the validity of that statute, as it governs the upcoming general election, has already withstood plaintiffs' challenges. Since there was a valid alternative for these five plaintiffs to have their party designated on the ballot, they are not entitled to a declaration that Elections Code §10210 is unconstitutional when it is applied to offices for which votes are cast statewide.

The plaintiff political parties and the other eleven individual plaintiffs, however, are entitled to declaratory relief. As to these plaintiffs, Elections Code §10210 presently unconstitutionally prohibits the designation of a local party on the general election ballot following the name of a candidate for a local partisan office. Nevertheless, even assuming that all eleven plaintiffs succeed in meeting the requirements of the "independent" nomination process and gain a place on the ballot, the Court must decline to grant them the injunctive relief they request.[7] The Court has no method of insuring that the political parties these candidates represent have sufficient community support in the particular local districts where their candidates wish to run to justify having the party name on the ballot. Even if the signature requirements of Elections Code §6831 were an acceptable test, the Court cannot determine that voters signing these nominating petitions were informed that the potential candidate represented a particular party.[8] The affidavits submitted by the plaintiffs are not sufficient for this purpose. In addition, there is no way for the Court to insure that these candidates have been selected in a democratic manner to represent their party.

It is not the function of this Court to prescribe for the state how it should go about solving these problems

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[7]With respect to this issue, plaintiffs request the Court "order Defendant to print to the right of each Plaintiff candidate who obtains the required number of signatures pursuant to §6830 the political party with which such candidate is affiliated, and the name(s) of any additional party or parties to nominate such candidate, . . ."

[8]The prescribed form for the nominating petitions does not provide a place for identifying the party affiliation of the potential candidate. Elections Code §6838.

when providing access to the ballot to local political parties. The "independent" nominations procedure is not oriented toward these problems, and nothing in this opinion should be taken to mean that the state cannot devise another system that would provide local party access to the ballot in a constitutional manner. There is not enough time before the upcoming general election to permit the state to devise a system and put it into operation. Finally, there is no present indication that the state will not in the future observe in good faith the declaratory relief plaintiffs have obtained and create a reasonable method for local party access to the general election ballot for local partisan elections.

One final aspect of the amended complaint remains. Although not provided for in the Court's order of June 7, 1976, plaintiffs have "taken the liberty" of adding a challenge to Elections Code §311 to the amended complaint. That statute prescribes the form of the voter registration cards distributed to potential registrants. This statute was enacted as part of a new system of voter registration in California. 1975 Cal. Stats. Ch. 704. As noted in the Court's previous order, this new system did not affect the ability of parties to qualify statewide for the upcoming general election ballot but that in determining the validity of Elections Code §6430 with respect to future elections the new voter registration system would have to be considered. The new statute does not affect the present problem of denial of local party access to the ballot. The constitutionality of Elections Code §311 is therefore not directly connected with any of the concerns that have heretofore been the focus of this lawsuit. Under these circumstances, the Court is of the view that the challenge to elections Code §311 should be dismissed without prejudice so that plaintiffs may renew their challenge to it, if they so desire, in a new lawsuit that

concentrates directly on these aspects of California's election laws.

ACCORDINGLY, IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is GRANTED IN PART and that plaintiffs are entitled to a declaratory judgment in accord with the above opinion.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is GRANTED with respect to plaintiffs Camejo, Reid, Musa, Macbride, and Bergland, and that the balance of defendant's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that the allegations of the amended complaint challenging the constitutionality of California Elections Code §311 are hereby DISMISSED WITHOUT PREJUDICE.

DATED: September 9, 1976.

/s/Albert C. Wollenberg
ALBERT C. WOLLENBERG
United States District Judge

/s/James R. Browning
JAMES R. BROWNING
United States Circuit Judge

/s/William G. East
WILLIAM G. EAST
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-73-1165 ACW
(Three-Judge Court)

SOCIALIST WORKERS PARTY, *et al.*,

Plaintiffs.

v.

MARCH FONG EU, Secretary of State of the State of California,

Defendant.

JUDGMENT

This action having come before the Court, Honorable James R. Browning, Circuit Judge, Honorable Albert C. Wollenberg, District Judge, and Honorable William G. East, District Judge, presiding, and the issues having been duly presented by the parties, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The application of plaintiffs (excluding plaintiffs Camejo, Reid, Musa, Macbride, and Bergland) for declaratory relief is granted, and the Court hereby declares that Section 10210 of the California Elections Code is unconsitutional insofar as it prohibits the designation of political parties on the general election ballot following the name of a candidate for a non-statewide partisan office if the political party has not

qualified pursuant to Section 6430 of the California Elections Code.

2. All other requests for relief by plaintiffs are denied.

DATED: September 9, 1976.

/s/Albert C. Wollenberg
ALBERT C. WOLLENBERG
United States District Judge

/s/James R. Browning
JAMES R. BROWNING
United States Circuit Judge

/s/William G. East
WILLIAM G. EAST
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. 73-1165 ACW

SOCIALIST WORKERS PARTY, *et al.*

Plaintiffs,

v.

MARCH FONG EU, Secretary of State of the State of California,

Defendant.

NOTICE OF APPEAL

TO: THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA AND TO DEFENDANT MARCH FONG EU AND HER ATTORNEY, THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that Plaintiffs SOCIALIST WORKERS PARTY, PETER CAMEJO, WILLIE MAE REID, VIRGINIA GARZA, OMARI MUSA, ABEL L. MENDOZA, MANUEL R. MACIAS, JOSE GONZALES, FROBEN LAZODA, LA RAZA UNIDA PARTY, ANDRES RODRIQUES TORRES, PROHIBITION PARTY, WILLIAM SCALF, SOCIALIST LABOR PARTY, HERBERT STEINER, LIBERTARIAN PARTY, ROGER L. MACBRIDE, DAVID BERGLAND, LEON STEINHARDT, MICHAEL MARTIN, DAVID SUTTON, and

CHARLES SCARF hereby appeal to the United States Supreme Court from the entirety of Paragraph Two of the Judgement of the District Court in the within cause, entered on September 30, 1976. This appeal is taken pursuant to 28 U.S.C. §1253 and Rule 10 of the Rules of the Supreme Court of the United States.

DATED: November 23, 1976.

Respectfully submitted,

RAY HENDRICKSON
HAFER & SILLS

KENNETH L. STAHL

BY:

/s/Kenneth L. Stahl
KENNETH L. STAHL

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) ss.

SUZANNE I. WHITE, being irst duly sworn, on oath deposes and states:

I am over 18 years of age, and not a party to the within cause; my business address is 728 Montgomery Street, Suite 35, San Francisco, California, 94111. On November 23, 1976 I served a true copy of the attached:

NOTICE OF APPEAL

on the following, by placing same in an envelope addressed as follows:

CHARLTON G. HOLLAND
Deputy Attorney General
6000 State Building
San Francisco, CA 94102

Clerk of the United States District Court
For the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Said envelope was then, on November 23, 1976, sealed, and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

/s/Suzanne I. White
SUZANNE I. WHITE
Affiant

Subscribed and sworn to before me this 23rd day of November, 1976.

/s/Peter G. Keane
NOTARY PUBLIC in and for
said City, County, and State

§6430. Qualified parties

A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for

initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election.

§6460. Statements by county clerk and secretary of state

A statement of the number of voters in his county at the close of registration on the 19th day prior to the transmission of such statement shall be transmitted to the Secretary of State by each county clerk at the following times:

(a) On the 135th day before each presidential primary and before each direct primary.

(b) On the 35th day before each statewide election.

The statement shall show the total number of voters in the county, the number registered as affiliated with each political party, and the number who declined to state a party affiliation.

The statement shall also show the number of voters, by party affiliations, in each city, assembly district, senatorial district, supervisorial district, and congressional district located in whole or in part within the county.

The Secretary of State, on the basis of the statements transmitted to him by the county clerks, and within 30 days after receiving such statements, shall compile a statewide list showing the number of voters, by party affiliations, in the State and in each county, city, assembly district, senatorial district, congressional district, and supervisorial district in the State. A copy of this list shall be made available, upon request, to any elector of this State.

§10210. Political affiliation of candidates; independent candidates

In the case of candidates for partisan office in a general election or in a special election to fill a vacancy in the office of Representative in Congress, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or immediately below the name, if there is not sufficient space to the right of the name, there shall be printed in eight-point roman lowercase type the name of the qualified political party with which the candidate is affiliated.

In the case of candidates for President and Vice President, the name of the party shall appear to the right of and equidistant from the pair of names of such candidates.

If for a general election any candidate has received the nomination of any additional party or parties, the name(s) shall be printed to the right of the name of the candidate's own party. Party names of a candidate shall

be separated by commas. If a candidate has qualified for the ballot by virtue of an independent nomination, the word "Independent" shall be printed instead of the name of a political party in accordance with the above rules.

CHAPTER 6. INDEPENDENT NOMINATIONS

ARTICLE 1. GENERAL PROVISIONS

6800.

A candidate for any public office, including that of presidential elector, for which no nonpartisan candidate has been nominated or elected at any primary election, may be nominated subsequent to or in lieu of a primary election pursuant to this chapter.

6801.

A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his party nomination at the primary election, is ineligible for nomination as an independent candidate.

6802.

For the purposes of this chapter, the provisions of Chapter 5 (commencing at Section 6400) of this division, so far as consistent with this chapter, shall apply to all offices for which nominations are made at the presidential primary and direct primary elections, as well as to elections for any other office to which Chapter 5 (commending at Section 6400) of this division would not ordinarily apply.

6803.

Whenever a group of candidates for presidential electors, equal in number to the number of presidential electors to which this state is entitled, files a nomination paper with the Secreatry of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote.

6804.

When a group of candidates for presidential electors designates the presidential and vice presidential candidates for whom all of the group pledge themselves to vote, the names of the presidential candidate and vice presidential candidate designated by that group shall be printed on the ballot pursuant to Chapter 2 (commencing with Section 10200) of Division 7.

ARTICLE 2. NOMINATION PAPERS

6830.

Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in

the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed.

6831.

Nomination papers for a statewide office for which the candidate is to be nominated shall be signed by voters of the state equal to not less in number than 1 percent of the entire number of registered voters of the state at the time of the close of registration prior to the preceding general election. Nomination papers for an office, other than a statewide office, shall be signed by the voters of the area for which the candidate is to be nominated, not less in number than 3 percent of the entire number of registered voters in the area at the time of the close of registration prior to the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000.

6831.1.

(a) Within 30 days from the date of receiving the nomination paper if, from the examination of such pursuant to Section 6831, more than 500 signatures have been signed on the nomination paper petition, the elections official may use a random sampling technique for verification of signatures. The random sample of

signatures to be verified shall be drawn in such a manner than every signature filed with the elections official shall be given an equal opportunity to be included in the sample. Such a random sampling shall include an examination of at least 500 or 5 percent of the signatures, whichever is greater.

(b) If the statistical sampling shows that the number of valid signatures is within 90 to 110 percent of the number of signatures of qualified voters needed to declare the nomination paper sufficient, the elections official shall examine and verify each signature filed.

(c) In determining from the records of registration, what number of valid signatures are signed on the nomination paper, the elections official may use the duplicate file of affidavits maintained, or may check the signatures against facsimiles of voters' signatures, provided that the method of preparing and displaying the facsimiles is permitted by law.

(d) The elections official shall attach to the nomination paper a certificate showing the result of this examination, and shall notify the candidate of either the sufficiency or insufficiency of the nomination paper.

(e) If the nomination paper is found insufficient, no action shall be taken on the nomination paper. However, the failure to secure sufficient signatures, shall not preclude the filing later of an entirely new nomination paper to the same effect.

(f) If the nomination paper is found to be sufficient, the elections official shall certify the results of the examination.

6832.

When a nomination paper or sections of a nomination paper have been received which contain the number of signatures required in Section 6831, the

officer with whom those papers are required to be filed shall not receive or file additional sections of the nomination paper for the candidate named in it.

6833.

Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 129 nor less than 64 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 134 days before the election and no later than 5 p.m. 74 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures.

6834.

Each signer of a nomination paper shall sign but one paper for the same office, except that in case two or more persons are to be elected to the same office at the same election, an elector may sign the nomination papers of as many persons as there are persons to be elected to the office, and such act on the part of an

elector shall not be deemed in conflict with the signer's statement prescribed in this chapter.

The signer shall declare his intention to support the candidate for nomination, and shall add his place of residence, giving his street and number, if any.

6835.

Any nomination paper may be presented in sections, but each section shall contain the name of the candidate and the name of the office for which he is proposed for nomination. Each section shall bear the name of the city or town, if any, and the name of the county in which it is circulated.

6836.

The affidavit of any circulator obtaining signatures under this chapter shall be verified free of charge by any officer authorized to administer oaths.

6837.

A verified nomination paper is prima facie evidence that the signatures to it are genuine and that the persons signing it are voters unless it is otherwise proven by comparison of the signatures with the affidavits of registration in the office of the county clerk.

6838.

Each section of a nomination paper shall be as follows:

County of , City (or Town) of (if any).

Nomination paper of , candidate for the office of

State of California }
County of } ss.

SIGNER'S STATEMENT

I, undersigned, am a voter of the City (or Town) of _____, County of _____, State of California. I hereby nominate_____, who resides at No. _____, _____Street, City of_____, County of_____, State of California, as a candidate for the office of_____to be voted for at the election to be held on the_____day of_____, 19___. I have not signed the nomination paper of any other candidate for the same office, and I further declare that I intend to support for election the candidate named herein. I did not vote a partisan ballot at the immediately preceding primary election.

No.	Printed Name	Signature	Residence
1			
2			
3			
4			
5			
etc.			

CIRCULATOR'S AFFIDAVIT

I,_____, solemnly swear (or affirm) that I have been appointed as a circulator to secure signatures in the County of_____to the nomination paper of _____as candidate for the office of_____; that the signatures were obtained between_____, 19___and_____, 19___; that all the signatures on this section of the nomination paper, numbered from 1 to_____inclusive, were made in my presence, and that, to the best of my knowledge and belief, each signature is the genuine signature of the person whose name it purports to be.

(Signed)_____
Circulator

Subscribed and sworn to before me this_____day of_____, 19___.

(SEAL) Notary Public (or other official)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROGER MacBRIDE, et al,)
Plaintiffs,)
)
vs.)
)
THE HONORABLE J. JAMES)
EXON, et al,)
Defendants.)

FILED
DISTRICT OF NEBRASKA
AT ____ M
SEP 3 1976
William L. Miller, Clerk
By ____ Deputy

MEMORANDUM
CV76-L-176

This is an action by plaintiffs seeking mandatory injunctive and declaratory relief against J. James Exon and Allen J. Beermann as individuals. J. James Exon is the Governor of the State of Nebraska and Allen J. Beermann is the Secretary of State of the State of Nebraska. The plaintiffs assert jurisdiction under 28 U.S.C. §§1343(3) and (4), 28 U.S.C. §2201, 42 U.S.C. §1983, and 42 U.S.C. §1985; they allege that the defendants have wrongfully and unconstitutionally barred Roger MacBride from electoral consideration for the office of President of the United States as a candidate of the Libertarian Party by refusing to place the name of Roger MacBride on the electoral ballot for the November, 1976, general election for the office of President of the United States.

The plaintiffs Gale R. Arch and Burton Jay allege that they have been barred from being appointed as MacBride's presidential electors in the November, 1976, election, in the event MacBride is elected in the State of Nebraska for the office of the President of the United States. The plaintiffs Guy Curtis and Daniel H. Haak allege that as registered voters they will be barred from voting for MacBride for the office of the President of the United States in the November, 1976, general election.

The plaintiffs allege that statutory provisions in Nebraska, to-wit: 32-504, 32-526, 32-556, 32-561, and 32-4,108, and other related statutes, are unconstitutional and are violative of Article II, Section 1, and Article VI of the Constitution of the United States and the First, Fifth, Twelfth, and Fourteenth Amendments thereto. The parties have presented a stipulation of facts; oral argument was presented to the court on August 31, 1976.

The defendants have filed a motion to dismiss, filing 5, for lack of jurisdiction. As stated orally from the bench on August 31, the motion is denied.

It is clear that the State of Nebraska must be able to show a compelling state interest in the regulation of ballot access before burdens can be imposed on the right to vote and to associate. *Williams v. Rhodes*, 393 U.S. 23 (1968). The burden over which the plaintiffs most strongly complain is that which requires a party candidate seeking access to the presidential ballot to comply first with §32-526 for the formation of a new political party.[1] The plaintiffs urge that imposing a

[1] "32-526. New political party; formation; procedure. (1) In order to form a new political party there shall be presented to the Secretary of State petitions containing signatures totaling not less than one per cent of the total votes cast for the office of Governor at the most recent general election for such office. The signatures of registered electors on such petitions must be so distributed as to include qualified registered electors totaling at least one per cent of the votes cast for Governor in the most recent gubernatorial election in each of at least one-fifth of the counties in this state. The petitions must be filed with the Secretary of State at least ninety days before any state primary election held under the laws of this state. Prior to the circulation of such petitions to form a new political party, a sample copy of such petitions must be filed with the Secretary of State by the individual, group or association seeking to establish the new party. In addition, the sample petition shall be accompanied by a verified list of the names and addresses of the individual, or the members of the group or association sponsoring the petition to form a new political party. The form of the petition for the formation of a new party shall be substantially as follows: . . ."

See also subsections (5) and (7).

requirement for such extensive party organization and for a showing of a level of community support at a date ninety days before the primary election is unduly burdensome.

The Supreme Court in *Williams v. Rhodes*, supra, struck down the requirement of the Ohio election law which mandated extensive pre-primary organization, election at a primary of delegates and alternates to a national convention (such delegates not having voted as a member of a different party at a primary election in the preceding four years), and nominating petitions for those seeking to run in the primary. The court said:

> "The State also argues that its requirement of a party structure and an organized primary insures that those who disagree with the major parties and their policies 'will be given a choice of leadership as well as issues' since any leader who attempts to capitalize on the disaffection of such a group is forced to submit to a primary in which other, possibly more attractive, leaders can raise the same issues and compete for the allegiance of the disaffected group. But while this goal may be desirable, Ohio's system cannot achieve it. Since the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected 'group' will rarely if ever be a cohesive or identifiable group until a few months before the election. Thus, Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group from ever getting on the ballot and the Ohio system thus denies the 'disaffected' not only a choice of leadership but a choice on the issues as well."
>
> 393 U.S. at 32-33

Recently, the court in *Lendell v. Bryant*, 387 F. Supp. 397, 402 (U.S.D.C. E.D. Arl. 1975) (three-judge),

struck down an Arkansas statute requiring nominating petitions for independent candidates to be filed seven months before the election. The court said:

> "Basically, we think, the objectionable feature of the two-fold requirement of the statute is that while American citizens are not required to exercise their franchise or participate in the political process within the framework of organized political parties, most of them do, and serious independent candidacies generally arise from substantial public dissatisfaction with party nominees or with the positions taken by the organized parties with respect to important issues. And that dissatisfaction does not ordinarily manifest itself until party nominees and party positions are known. It is simply too much to require a would-be independent candidate to obtain the signatures of 15 percent of the qualified electors of a State or political subdivision thereof weeks in advance of primary elections and months ahead of the general election. See in this connection the remarks of Mr. Justice Brennan in his dissenting opinion in Storer v. Brown, supra, 415 U.S. at 755, 758, 94 S. Ct. 1274."

The court finds the statutory scheme in the State of Nebraska requires a political party to organize and seek certification ninety days before the state's primary election (and thus nine months prior to the November general election) in order to secure a ballot position in the November, 1976, general election. Certainly the state may do much in the regulation of political parties. See *Williams v. Rhodes*, supra; *Jenness v. Fortson*, 403 U.S. 431 (1971); and *American Party of Texas v. White*, 415 U.S. 767 (1974). But the state has not pointed to nor have I been able to discern any compelling interest to require every political party seeking to have its presidential candidate placed on the November general election ballot to be certified in advance of the May primary. Likewise, the state has not

pointed to nor have I been able to discern any compelling interest which would require every political party seeking to have its candidate placed on the November general election ballot to participate in the state's presidential primary in May. Under these circumstances, the court finds that to require the Libertarian Party to be "certified," which includes both a showing of popular support and compliance with organizational requirements, ninety days in advance of the primary and thus nine months prior to the general election is an arbitrary restriction upon the right of voters to vote for candidates of their choice. Accordingly, the statutes of the State of Nebraska, as set forth above, are unconstitutional to that extent and are in violation of the First and Fourteenth Amendments to the Constitution of the United States. It is no defense to argue that all political parties face the same obstacles to ballot access and therefore no discrimination is present. In the first place, this argument does not address itself to the arbitrariness of the statute. Second, *Jenness v. Fortson*, supra, points out:

> "The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. . . . Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in Williams v. Rhodes, supra."
>
> 403 U.S. at 441-442

As stated in the recently decided case of *McCarthy v. Exon*, CV76-O-166, decided September 1, 1976, the state does have a compelling interest in determining that the candidate possesses a satisfactory level of community support. In view of the lateness of the filing of the complaint and the asserted necessity of having

ballots for certification to be printed no later than September 8, 1976, this court concludes that the Secretary of State on or before September 8, 1976, should determine whether or not Roger MacBride has a satisfactory level of community support in order to appear upon a certified ballot. The parties by and through counsel have stipulated that Roger MacBride is the certified candidate of the Libertarian Party for the office of President of the United States. In the absence of any controlling statute and in view of the emergency created by the time factor, the Secretary of State may take whatever steps are necessary to be assured that Roger MacBride has at this time a satisfactory level of community support. The court takes note that on or about Tuesday, August 24, 1976, a supporter of MacBride presented to the Secretary of State, Allen J. Beermann, petitions with 2,907 signatures which requested that electors who support Roger MacBride be put on the November ballot. It is the court's understanding that these petitions are in the possession of Allen J. Beermann at the present time. In the event that Allen J. Beermann determines that these petitions do not reflect a satisfactory level of community support for the candidacy of Roger MacBride and makes such determination in good faith and finds there is no other method by which to determine whether Roger MacBride maintains such a level of support, the said Allen J. Beermann need not place the name of Roger MacBride on the ballot. On the other hand, if said Allen J. Beermann determines that the petitions do reflect sufficient level of community support for the candidacy of Roger MacBride, he is then to place the name Roger MacBride on the ballot as a candidate of the Libertarian Party for the office of the President of the United States. In the event that the Secretary of State finds that Roger MacBride's name should be on the ballot, he shall process the ballots in the same manner as he would any other candidate properly certified for the

office of the President of the United States in the November, 1976, general election, as the laws of Nebraska now direct.

Because the filing of this action came so late, and despite acceleration of the scheduling of the briefs and oral argument and splendid cooperation of counsel for the defendant, this ruling could be made no earlier than it has been and a weekend and holiday immediately ensue, leaving scant time for the Secretary of State to make the determination required by this opinion and order; therefore, if Allen J. Beermann in good faith is unable to make the determination required by this opinion and order in time to permit the name of Roger MacBride to appear on the ballot, he need not place the name of Roger MacBride on the ballot.

In the event that Roger MacBride is a successful candidate for the office of the President in the November, 1976, general election, after a proper canvass of the vote as set forth by §32-4,101, the parties may return to this court for further direction as to proper certification of electors for the office of President of the United States.

The foregoing shall consist of findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

Dated September 3, 1976.

BY THE COURT

Chief Judge